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CHARLES ELMORE CR

No. 365.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

HENRY ESCHER, Ancillary Administrator of JAK. ROBERT SIGG-FEHR, deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST and EDMUND GAMS, Petitioners,

v.

WALTER O. WOODS, as Treasurer of the United States, and HOWARD SUTHERLAND, as Alien Property Custodian.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONERS.

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HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST and EDMUND GAMS,
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vs.

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ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONERS.

Opinions Below.

The opinion of the Court of Appeals of the District of Columbia is reported under the title "*Tate, United States Treasurer, et al.* v. *Escher, et al.*" in 33 F. (2nd) 556. It will be found in the record at page 90. No opinion was rendered in the Supreme Court of the District of Columbia in connection with the order appealed from and now presented to this Court.

After the decision in the Supreme Court of the District of Columbia Frank White resigned as Treasurer of the

United States and his successor H. T. Tate was substituted in his place as a party appellant (R., p. 98); and then H. T. Tate retired as Treasurer of the United States and Walter O. Woods, his successor as Treasurer of the United States, was substituted for him as a party in this suit (R., pp. 98-99).

Jurisdiction of This Court.

The judgment now presented for review is a final judgment of the Court of Appeals of the District of Columbia dated June 3, 1929 (R., p. 96) reversing a decree of the Supreme Court of the District of Columbia entered on April 2, 1928 (R., p. 84).

This cause is in this Court by virtue of an order filed October 21, 1929 (R., p. 101) granting petition of Plaintiffs-Appellees in the Court of Appeals—for a writ of certiorari. They will be referred to hereinafter as Plaintiffs and the defendants in the Supreme Court of the District of Columbia as Defendants.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case.

A. The Facts.

This case presents no disputed or controverted issues of fact. The questions of law arise out of a suit in equity brought in the Supreme Court of the District of Columbia under Section 9 of the Trading with the Enemy Act. The bill of complaint filed December 8, 1921, alleged that the Alien Property Custodian had seized certain money and property belonging to Plaintiffs, citizens of Switzerland, residing in that country, upon a wrongful or mistaken de-

termination that it belonged to a German corporation; and sought the release and return of the property or its proceeds, and its accretion and income. On December 10, 1927, after a long and hard-fought trial, the Supreme Court of the District of Columbia held that the Plaintiffs were entitled to the relief sought (see Opinion, R., pp. 64-65). On January 19, 1928, a final decree in favor of Plaintiffs was entered (R., pp. 65-66). This decree was consented to as to form, and no appeal was taken from it.

During the course of the trial one of the original plaintiffs, Jak. Robert Sigg-Fehr died, and Henry Escher was appointed Ancillary Administrator of his estate and substituted in his place as a party plaintiff (R., p. 30).

Pursuant to this decree and in purported compliance with it, the Alien Property Custodian submitted a statement of account (R., pp. 74-75). This account showed that Liberty Bonds and cash in the aggregate amount of $3,198,444.74 had been received by the Alien Property Custodian for the account of Plaintiffs; that disbursements from this cash in the amount of $891,953.40 had been made, and that there was on hand belonging to Plaintiffs a net balance of $2,306,491.34. It did not purport to cover interest upon or earnings from cash belonging to Plaintiffs covered into the Treasury of the United States, and it stated that the balance shown was subject to "administration expenses and expenses incidental to release, and additional charges of Dept. Justice, if any" (R., p. 75).

When the time for payment came it developed that the Defendants had deducted under the guise of so-called "administration expenses" and the Alien Property Custodian was claiming the right to retain for the use of his office the sum of $55,909.83. Plaintiffs, disputing the justice and lawfulness of this deduction, applied to the Supreme Court

of the District of Columbia for a rule directed against the Custodian and the Treasurer of the United States, requiring them to show cause why they should not be required forthwith to pay over the sum thus withheld (See Petition, R., pp. 69-78; Rule, R., pp. 79-80). Defendants filed a motion to dismiss and an answer (R., pp. 80-82); and plaintiffs filed a motion to strike out the answer for insufficiency (R., pp. 82-83).

After oral argument an order and decree was entered in favor of Plaintiffs finding the deduction and retention of this sum to be unlawful and without right, and ordering Defendants forthwith to pay this sum over to Plaintiffs (R., p. 84). From this order and decree Defendants appealed to the Court of Appeals of the District of Columbia. That Court reversed this decree of the Court below, and directed that the cause be remanded for further proceedings in accordance with its opinion (See order of reversal, R., p. 96; Opinion, R., pp. 90-95). It is this judgment of the Court of Appeals that Plaintiffs seek to have reviewed and reversed in this Court.

B. Question Presented.

The petition of Plaintiffs, upon which the rule to show cause issued, alleged in paragraph 6 (R., pp. 71-72) that the Alien Property Custodian had deducted from their money as alleged "administrative expenses" the sum of $55,909.83; that he was withholding and refusing to pay over this sum; and that in addition he claimed the right to make further deductions upon that account. The petition further alleged that this deduction was unauthorized by any valid provisions of the Trading with the Enemy Act and its amendments, and was contrary to the provisions of the final decree in favor of Plaintiffs and amounted to the taking of

the property of Plaintiffs without any authority of law. The sole excuse, justification or defense given by either of the Defendants for this appropriation of Plaintiffs' money is found in paragraph 6 of their answer, which reads as follows:

> "Further answering said paragraph, these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83, as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid" (R., pp. 81-82).

It is this answer that Plaintiffs moved to strike; and its sufficiency in law is the question which the record in this case presents.

This answer supposedly was framed in contemplation of Section 24(a) of the Trading with the Enemy Act which was added to the original statute by the amendment of March 24, 1923, generally known as the Winslow Bill (42 Stat. 1511-1516). This Section is set forth in full at pages 14-15 of this brief. Omitting inapplicable clauses, it reads as follows:

> "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such * * * expenses shall be paid out of the money or other property * * * in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or prop-

erty held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

The answer clearly is insufficient under this statute and it seems to us sets up no defense whatsoever. It "confesses" the charge of Plaintiffs, but does not even attempt to "avoid" it. It admits the taking, but alleges neither reason nor fact to justify it. The statement that the money had been paid into a fund, etc., is merely a statement as to what had been or would be done with the money. It is apparent, therefore, that the answer, though framed in contemplation of the statute, was drafted in utter disregard of it; and Defendants in arguing the case have wholly ignored their answer and the issue made by Plaintiffs' motion to strike it.

In the Court of Appeals they stated that the question presented by the appeal was: "Whether the Alien Property Custodian was authorized to deduct from the aggregate amount of appellees' seized property and accrued income therefrom an amount to cover the cost of collecting, protecting and administering such property." Under this they argued that the Alien Property Custodian, both as a trustee and under the provisions of the Trading with the Enemy Act, was authorized to deduct "all reasonable and proper expenses incurred by him (the Alien Property Custodian) in administering the trust", and that the sum deducted "is not more than a fair and reasonable charge for collecting, protecting and administering the appellees' seized property". All such arguments are unjustified and improper. The answer makes no allegation by direct statement or by inference that the amount withheld represents either the cost of or a reasonable charge for collecting, pro-

tecting or administering in any way the money and property of Plaintiffs and there is not a scintilla of proof of either in the record.

The Court of Appeals, however, appears to have been misled by these arguments because it bases its decision upon the unplead, unproven fact that the sum withheld represented "the expense incurred in protecting, disposing of, or investing" the property of Plaintiffs from which it was taken. (Last paragraph of Opinion, R. 95.)

In the brief filed in this Court in opposition to the petition of Plaintiffs for certiorari, substantially the same argument was presented although phrased in somewhat different language. It was asserted that "the Alien Property Custodian was constitutionally authorized to deduct from property seized by him a fair charge for administering it", and that "the deduction of $55,909.83 is a proper charge for expenses of administering an estate for ten years where the principal amounted to over $3,000,000 and the accumulated earnings thereon aggregated over $1,000,000" (Point I, p. 6; Point II, p. 11). In support of these contentions it was argued (pp. 12-13) that the amount deducted is a "reasonable charge" for administering the property of Plaintiffs and various facts or supposed facts with respect to such administration are cited and discussed.

As a result of objection made to this brief, there was filed on behalf of Defendants, a supplemental memorandum in which was admitted that no testimony was introduced at the hearing in the Supreme Court of the District of Columbia, at which the deduction in question was held unlawful; and that it was not meant to indicate that there was any testimony showing the exact cost of the administration of Plaintiffs' property. The contention was stated to be that

"it would be impossible to figure such costs" and "it was not feasible to apportion any aliquot part of the salaries of particular persons or other general expenses among the numerous estates handled". In addition, it was admitted that the amount deducted was 2% of the money and property from which the deduction was made.

Thus we have at last an admission from Defendants that the sum withheld does not represent the cost of administering Plaintiffs' seized property and that it is simply an assessment of 2% of its value, but upon what basis or in what way the Custodian fixed upon 2% as the amount of the assessment to be levied is not disclosed by either pleading or proof.

The contention now made in this Court is that "the sum deducted was not an unreasonable one for the Custodian to charge as administrative expenses" and that the Court of Appeals could decide this question of fact, as to which there is neither pleading nor proof of any kind, solely "from the facts which appear in the record in regard to the amount of the property and the time for which it was held." (See Supplemental Memorandum, p. 3, paragraph 3.)

Plaintiffs claim that the taking of their money in this way amounts to depriving them of their property without due process of law and its appropriation to public use, to wit, the administration of the office of the Alien Property Custodian, without just compensation.

They do not contest the deduction by the Custodian of all reasonable disbursements or expenditures necessarily made for the purpose of protecting their money and property and which are directly attributable to such money or property; but no such expenses are now in question. They

deny the right of the Custodian to pay any part of the general expenses or overhead of his office out of their property which was wrongfully or at least mistakenly seized by him, and in particular they contest his right to deduct on that account a percentage of their money and property arbitrarily fixed by him. They contend that as a matter of fact and of law the cost or expense of administering property is not and cannot be measured by the amount of value of that property, and that even if deduction of some percentage be permissible, the Custodian cannot fix arbitrarily upon what that percentage shall be.

The question which this case now presents to this Court therefore is whether the Alien Property Custodian was and constitutionally could be authorized to appropriate from non-enemy property wrongfully seized any amount on account of the overhead or general expenses of administering his office; and if so, whether the amount so to be deducted can be a percentage arbitrarily fixed by the Custodian.

Specification of Errors to be Urged.

1. The Court of Appeals erred in not holding that the answer of the Alien Property Custodian and the Treasurer of the United States to the rule to show cause issued out of the Supreme Court of the District of Columbia failed to set forth any facts sufficient to justify the deduction and withholding from the money of these petitioners of the sum of $55,909.83, or any part thereof.

2. The Court of Appeals erred in holding that the Alien Property Custodian had the right to deduct from the money of these petitioners any sum or sums other than the amount of expenses reasonably and actually incurred by him for

protecting or administering the money and property of these petitioners and which was directly attributable to or directly incurred because of such money or other property.

3. The Court of Appeals erred in not holding that the Alien Property Custodian had no right to withhold or deduct from the money of these petitioners, as so-called administrative expenses, a percentage thereof arbitrarily fixed or determined upon by the Alien Property Custodian.

4. The Court of Appeals erred in finding that the sum of $55,909.83 deducted and withheld by the Alien Property Custodian from the money of these petitioners represents expenses incurred in protecting or administering the money and other property of these petitioners held by the Alien Property Custodian and/or the Treasurer of the United States.

5. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a depriving them of their property without due process of law in contravention of the provisions of the Constitution of the United States.

6. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a taking of their property for public use without just compensation.

7. The Court of Appeals erred in not affirming the order and decree of the Supreme Court of the District of Columbia entered on April 2, 1928.

8. The Court of Appeals erred in reversing the order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928.

Summary of the Argument.

The Alien Property Custodian was not given, and constitutionally could not be given the right to appropriate from the money of these plaintiffs as so-called administrative expenses the sum of $55,909.83 or any part of it, and therefore the judgment of the Court of Appeals should be reversed and the decree of the Supreme Court of the District of Columbia affirmed because:—

A. The provisions of the Trading with the Enemy Act expressly limit the deductions for expenses to the amounts actually and necessarily incurred on account of the particular money and property from which the deduction is sought to be made; and

B. Even if this would include any part of the salaries and other general expenses of operating the Custodian's office—which we deny—the provisions of the Fifth Amendment to the Constitution do not permit the Custodian to appropriate under the guise of expenses any percentage of Plaintiffs' money and property much less a percentage arbitrarily fixed by him without notice to the owner; and

C. The bringing of Plaintiffs' suit under Section 9 of the Trading with the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Alien Property Custodian can charge against Plaintiffs upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property; and

D. The defendants having deducted the full amount of all expenses directly attributable to the money and property of Plaintiffs and having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of Plaintiffs' money and property, the Custodian has no right to deduct and withhold any additional amount whatsoever on account of his so-called "administrative expenses."

Argument.

This case, as we see it, now presents a clear-cut and rather narrow question of statutory construction, interpreted in the light of the constitutional limitations upon the taking of private property imposed by the Fifth Amendment.

The Alien Property Custodian asserts the right to take two per centum of the money and property admittedly belonging to Plaintiffs to be used by him toward maintaining and operating his office. As he is an official of the United States who seized Plaintiffs' property, not with their consent, but forcibly by virtue of authority conferred upon him by statute, he cannot assert any claim to compensation for services rendered, such as a trustee of a private trust is entitled to claim, but must find some express and valid statutory provision which clearly justifies this taking.

U. S. v. *Shields,* 153 U. S. 88, 91;
U. S. v. *Van Duzee,* 185 U. S. 278, 281;
Stetler v. *McFarlane,* 230 N. Y. 400, 408;
Campbell v. *Cothran,* 56 N. Y. 279, 281;
Crofut v. *Brandt,* 58 N. Y. 106.

This, it is claimed, is to be found in the Trading with the Enemy Act, and particularly in Sections 12 and 24, and in certain executive orders issued by the President in 1918. Section 12 as amended by the Act of March 28, 1918 (Chap. 28, 40 Stat. 460) gave to the Custodian acting under the supervision of the President practically unlimited power of management and disposition (*U. S.* v. *Chemical Foundation*, 272 U. S. 1) and Section 24 added to the original act by the Winslow Bill, approved March 4, 1923 (Chap. 285, 42 Stat. 1516), authorized the Custodian to pay out of seized money and property taxes assessed against it and necessary expenses incurred in respect of it, even though suit for the property might be pending. These sections we discuss presently.

Our view, however, is that the question here involved is governed by Section 9 alone. This section provided that property and money sued for under that section must be held in the custody of the Custodian or the Treasurer of the United States, as the case may be, until termination of the suit, and if that be in favor of the claimant, forthwith paid and delivered over to him. It was upon the strength of this provision that the summary power of executive seizure upon mere suspicion of enemy ownership was upheld by this Court. (*Central Union Trust Company* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Company* v. *Miller*, 262 U. S. 51.)

The property of these Plaintiffs having been seized upon the pledge of that statute that it would be returned if found not subject to seizure, it was beyond the power of Congress in 1923, after the war was over and seizures ended, to revoke that pledge and authorize the Custodian in the face of the pending suit to pay out or dispose of any part of the money or property sued for. The attempt to make Sec-

tion 24 apply to property the subject matter of a suit which contested the rightfulness of the seizure, must be held in violation of the Constitution and that provision of this section must be held void. For the same reasons Section 12 and the executive orders of 1918 must be held to apply only to money and property the seizure of which was not contested. The requirements of "due process" seems to us to make this view of the situation incontestable; nevertheless, as we are unable to find in the statutory provisions relied upon by Defendants anything which justifies the appropriation by the Custodian to his own uses of an arbitrarily fixed percentage of their money and property, we will discuss first Section 24 and the allied provisions of the statute, and then Section 9 and our reasons for contending that that section alone applies in this case.

I.

The Trading With the Enemy Act does not purport to authorize the alien property Custodian to create an expense fund by levying assessments upon money and property seized by him: but if it does, such assessments must be levied upon only enemy property rightfully seized to avoid unconstitutionality.

Section 24 reads as follows:

> "The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money

or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act" (Sec. 24 of the Trading with the Enemy Act; added by Act of March 4, 1923; 42 Stat. 1516).

The provision as to the payment of taxes is a re-enactment with some amplification of a provision contained in the Appropriation Act of July 1, 1918. (C. 113, Sec. 1, 40 Stat. 646). The rest of the Section is new. These provisions are amendatory, indicating a change in the existing law, and obviously are designed to be a complete statement of the powers of the Custodian in the respects mentioned, indicating the limits as well as the existence of the powers.

It is to be noted:

FIRST: That all of the payments authorized to be made must be such as are *necessary;* and

SECOND: That every payment which the Custodian is authorized to make is one directly connected with and chargeable against the particular property involved.

(a) *Taxes.* They are such as are "assessed against" the particular fund—such as are necessarily payable therefrom.

(b) *"Expenses" of "Securing Possession".* It is true that Congress here sanctions a charge which does not bene-

fit the non-enemy owner of the property who subsequently establishes his claim to it. The expense is, none the less, one directly connected with the particular fund, as distinguished from any other fund whatsoever. The expense of "collection" or "control" of the property is of the same character.

(c) *Expense of "Protecting" or "Administering" the Property.* Again, the "expense" indicated is obviously one directly connected with the particular fund, as distinguished from any other. Both the language used and the context make this clear. If there were any ambiguity —and there is not—the doctrine *noscitur a sociis* would determine the case.

THIRD: That the statute all the way through uses the words "to pay" and "shall be paid out of", thus indicating that what it contemplates is actual disbursements attributable to the money or property involved, as opposed to the fixed or regular costs of maintaining the Custodian's office.

The first half of this section very clearly and definitely limits the payments or expenses which can be charged against property to such as are attributable directly to the money or property involved, but if there be any doubt, the last half of the section removes it. This provides specifically that the taxes and expenses shall be paid *out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred.* There is one exception, but this exception emphasizes the limitation. If the money or other property against which the taxes are assessed, or in respect of which the expenses were incurred, is insufficient to permit payment, then—and by necessary implication only then—can the taxes or ex

penses be paid out of other money or property, and even then *only* out of money or property *held for the same person.*

We have, therefore, a direct express statutory mandate to the Custodian that in so far as concerns taxes and such expenses as can be charged against the money and property in his custody, each item of money and property is to be treated as a separate unit, and that payments on account of one item of money or property cannot be charged against or taken out of any other money or property; except only to this extent: that if the money or property in question is insufficient, the deficit may be paid, not out of other money and property generally, *but only out of other money or property belonging to the same person.* These provisions, which grant the right, necessarily define its limits and very clearly deny to the Custodian the right of charging against the money and property of these plaintiffs anything except taxes lawfully assessed against it and the actual amount of *"necessary expenses" incurred in respect of this very money and property.*

These provisions seem to us very plainly to exclude any part of the general expenses of operating the Custodian's office. Such expenses are necessitated by and therefore are attributable to the administration of the office as a whole and not to any particular item or items of money or property; and necessarily they include many items of expense beyond those things mentioned in the statute. However, if the statute does contemplate that any part of the salaries of employees, rents and other fixed expenses should be charged against the different items of money and property held, it was incumbent upon the Custodian to keep reasonably complete and accurate records of the actual amount of

such expenses so that they might be paid only "out of the money or other property in respect of which such expenses are incurred," as the statute in unmistakable language makes mandatory.

We have no quarrel with the political theory that the cost of administering the Alien Property Custodian's office should be paid out of *enemy* property which was rightfully seized; nor are we called upon in this case to discuss the political advisability of delegating to the Alien Property Custodian the power of writing his own appropriation bills by giving to him the power to take for administrative purposes from property in his custody whatever amount he may, in his uncontrolled discretion, see fit to take. As a matter of practical administration, the policy of apportioning the amount to be deducted among the owners of the seized property, according to the value of the property and the amount of money held, has much in its favor; *and in so far as this is limited to enemy property that was properly seized, Congress unquestionably and undeniably has the power so to authorize and direct.*

If, however, it had been intended by this statute to make such provision; if Congress had intended to authorize and direct the Alien Property Custodian to assess the total cost of administering his office against all the money and property seized by him in proportion to the amount or value of such money and property, it would have been a very simple matter to have so directed. This statute clearly directs an entirely different procedure. It does not refer to or discuss the cost of administering the Custodian's office, but only *expenses necessarily incurred in respect of the particular money and property in question;* and expressly directs that each item of money and prop-

erty be charged only with the actual expenses incurred in respect of that particular money and property.

As we endeavor to show presently, this statute authorizes certain kinds of expenses to be charged against property which we believe under no theory can be charged against property wrongfully seized; but irrespective of what kinds or items of expense the statute contemplates, it clearly specifies that each item of money and property shall be charged only with its own expenses and not with any part of the expense incurred in respect of other money and property. This, we think, must negative the Custodian's contention.

It is quite true that trustees' fees, lawyers' fees, insurance premiums and many other charges often are measured in whole or in part by the value of the property in respect of which the services have been rendered or the charges made. These cases are in no way analogous to the present situation. In such cases it is the benefit to the property or to the owner of the property, and not the actual cost of the service, which justifies the measuring of the charge by the value of the property. Such charges almost of necessity include an element of compensation or profit. The Custodian under no theory of law or of justice can make a profit out of non-enemy property wrongfully seized.

The distinction between "actual expenses" and "a reasonable charge" is clearcut and definite. The statute, as we have pointed out, uses the words "necessary expenses".

The expenses or costs of protecting or administering money and property are not and cannot be measured by the amount or value of the property. This seems to us to be one of those self-evident truths of which a Court will take judicial notice.

Defendants rely upon certain executive orders issued by the President as well as upon the provisions of Section 24, and assert that under these orders there was set up the practice of creating an expense fund by assessment upon money and property that had been seized by the Custodian. It seems to us unnecessary to discuss these orders in detail. Their plain language, like that of Section 24, clearly is insufficient to sanction any such practice, and when Congress attempted to legislate upon this very point, the statute necessarily superseded any orders of the President.

In addition, Defendants have cited a provision in the Appropriation Act for the fiscal year ending June 30, 1929, approved May 16, 1928, which provided that all expenses of the office of the Alien Property Custodian "shall be paid from interest and collections on trust funds and other property under the control of such Custodian" (Chap. 580, 45 Stat. 573-574). We are at a loss to understand how this Act, passed after final decree ordering return to Plaintiffs of their money and property, can have any bearing on this case; but, if it permits of any deduction, it would seem to us to be that Section 24 of the Trading with the Enemy Act did not sanction the practice which the Custodian had set up. If it did, why was this additional legislation necessary?

We submit, therefore, that the statute construed according to the natural meaning of the words used, clearly limits the deductions for expenses to such amounts as necessarily were incurred in respect of the money or property against which such expenses are charged; and even if any part of the salaries, rents and other general expenses of the Custodian's office come within the purview of these provisions, certainly only such identifiable or determinable items as were attributable to the money and property in question can be so charged. If this be the correct construction of the

statute, it must negative the Custodian's contention that he was authorized to create an expense fund by general levy upon all money and property held, but if the statute does purport to authorize such assessments, it must be held unconstitutional or else restricted in operation to enemy property rightfully seized. This seems to us clear upon several fundamental grounds.

In the first place, Section 24 and the Executive Orders as well specify several kinds of expenses which seem to us clearly not chargeable against property wrongfully or mistakenly seized.

A. *Expenses incurred in securing possession, or collection, or control.*

Unless the property is held adversely to both the real owner and the Custodian, there seems to us neither reason nor justice in charging such expenses against the owner from whom the Custodian takes the property by force. The Custodian's seizure of plaintiffs' property was made solely in the interest of and for the benefit of the United States. Such seizure was not necessary for the protection of the property nor was it made for that purpose. It was not made in the interest of the owner, but in hostility to him and in derogation of his rights.

In the case of *Gillespie* v. *Piles & Co.*, the Circuit Court of Appeals for the Eighth Circuit refused to tax such expenses against successful claimants of property reclaimed from a Receiver in Bankruptcy, saying:

> "There is manifest injustice and inequity in taking out of a fund or property in the custody of a Court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept

> from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its custody and pay compensation for the services of an attorney of a trustee or for services of any other party by means of which the fund or property has been taken or detained from its equitable owner" (178 Fed. 886, 892).

This Court, itself, uses similar language in the case of *Hobbs* v. *McLean, et al.*, saying:

> "As in our view the fund belongs to the plaintiffs in this suit, all that comes out of it for the compensation of the defendant comes out of their pockets. We see no reason why they should pay the defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which the defendant seeks pay from the plaintiffs were not rendered in their behalf, but in hostility to their interests" (117 U. S. 567, 581).

We concede the inevitability of some mistakes in the war-time rush of attempted capture of all enemy property, but this does not justify making the innocent victims of the Custodian's mistake bear the expense incurred by the Custodian in making that mistake and in taking from them their property which, as was afterwards proven, should not have been taken from them. Such expenses are a part of the cost of the war, to be borne as all other costs of the war. To make these plaintiffs pay such expense as a condition to getting back their property amounts to taking their property for public use without any compensation, much less just compensation. The remedy of Section 9 becomes far

from adequate if return of property under that section is subjected to any such undue burden as the payment of these expenses.

B. *Expenses incurred in protecting property.*

The Custodian under this clause has asserted the right to charge against property expenses incurred not only by the Custodian's office but by the Department of Justice as well, in resisting suit of the owner to recover the property wrongfully seized. (See Custodian's Statement of Account, R. pp. 74-75.)

What is said above as to expenses incurred in taking the property from the custody of the true owner applies with like force to expenses incurred in attempting to keep that owner from getting back his property. The Circuit Court of Appeals for the Ninth Circuit in the case of *Vowinckle* v. *Sutherland*, 24 Fed. (2nd) 196, has held that this cannot be done; that if such deductions were allowed the remedy of Section 9 would not be complete and adequate; and that to permit such deduction would work a grave injustice.

In addition there are necessarily numerous other items of expense incidental to the administration of a governmental agency such as the Custodian's office, no part of which for similar reasons can be charged against money or property ordered returned to the true owner. The Custodian, however, asserts the right to assess the total costs or expenses of his office against all of the money and property held, enemy and non-enemy alike. Conceding—which, however, most emphatically we do not—that it is proper to apportion the aggregate of general expenses according to the value of the property held, the non-enemy property can not be assessed with a proportionate part of the total

expenses, but only with its proportionate part of such expenses as properly may be charged against property mistakenly or wrongfully seized. If the assessment is levied at a rate sufficient to meet the total expenses of the office, is not the amount charged against the non-enemy property necessarily excessive? It seems to us this must be so.

If the Custodian is required upon accounting to submit an itemized statement of the disbursements or expenses which he seeks to charge against the property ordered returned, the proper items or amounts may be allowed and the improper items or amounts disallowed as in the case of any other accounting; and both the Government and the property owner receive what each justly and constitutionally is entitled to receive. The position of the Custodian, however, is that no such statement can be required of him, nor can he be questioned in any way either by the owner or by the Court with reference to the expenses he seeks to charge against the successful plaintiffs. In the brief filed in this Court in opposition to Petition for Certiorari, it is said at page 12:

> "The determination of the amount of administrative expense to be charged each estate, delegated by the President to the Custodian, should be final, unless clearly unreasonable. Must each successful claimant be given the right to inspect all of the books of account of the Custodian over a period of ten years, to cross-examine Custodians, past and present, as to their accounts, and to require the Court to apportion expenses between the different trusts?"

There is nothing in the statute which refers to a reasonable charge, the statutory words being "necessary expenses"; and we know of no rule or principle of law

which would authorize the Custodian to assess the property with a reasonable charge; but even if a reasonable charge be the measure of the deduction, how or in what way, except by inspection of the Custodian's books of account, and examination and perhaps cross-examination of the Custodians, past and present, can the Court determine whether the charge is reasonable or unreasonable? How else can it be determined whether the Custodian's office has been administered extravagantly or economically, and whether Plaintiffs' property has been safeguarded and properly taken care of, or wasted or squandered? How else can it be determined whether the Custodian in making his assessment has included or taken into consideration or account items of expense and services which had no relation whatever to Plaintiffs' property, or which could not properly be charged against Plaintiffs?

We know of no valid reasons why these books should not be subject to proper inspection, and the Custodians to proper cross-examination in the Court of Equity in which the Custodian is accounting; and certainly if the Custodian seeks to take any part of the money of these Plaintiffs under the guise of expenses incurred by him, he must justify his demand by his books and records and by his testimony if necessary, otherwise his appropriation of this money becomes a purely arbitrary act.

So far as this case is concerned, however, we believe the Custodian's fear that his books may be examined and he and his predecessors cross-examined, is unnecessary. It has been admitted, as we have already pointed out, that the sum here withheld is an assessment of two per centum levied against Plaintiff's property upon the theory that the Custodian can assess property in his custody at a rate

which will "aggregate an amount sufficient to cover his administrative expenses". (See brief in opposition to certiorari, p. 9; supplemental memorandum, pp. 2-3.) In other words, what the Custodian asserts the right to do is to tax the property in his custody at such a rate as will produce an expense fund sufficient to operate his office and maintain his organization in the way he may think it should be run. Even if it be conceded that the Custodian could be given the power of levying special assessments or taxes against private property not subject to capture, he still could not levy such assessments arbitrarily and without notice to the owner, and without any procedure whereby his assessment could be reviewed and corrected if found erroneous.

Stuart v. *Palmer*, 74 N. Y. 183, 189, 191-193, 194;
Cent. of Ga. Ry. v. *Wright*, 207 U. S. 127, 142.

II.

The bringing of plaintiffs' suit under Section 9 of the Trading With the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Alien Property Custodian can charge against plaintiffs upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property.

At the outset of this argument we stated our view to be that the question presented here is governed by Section 9 and Section 9 alone. This section has provided continuously from the original enactment of the Trading with the Enemy Act:—

"If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." (40 Stat. 419; 41 Stat. 35; 41 Stat. 977; 41 Stat. 1147; 42 Stat. 351; 42 Stat. 1065; 42 Stat. 1511; 44 Stat. 406; 45 Stat.....)

It was upon the strength of this provision of the statute that the power of summary seizure of property merely supposed to be enemy property was sustained. In the first case to come before this Court (*Central Union Trust Company* v. *Garvan*) Mr. Jutice Holmes in discussing this provision says:

"To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession,—that the property is to be conveyed to him; and that by, the Act of March 28, 1918, chap. 28, 40 Stat. at L. 459, 460, enlarging §12, the Custodian 'shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed,' etc., to him, and is given the power to sell and manage the same as though he were absolute owner. *All this may be conceded if no claim is filed.* But this act did not repeal §9, which is amended by the

> later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing, but the preliminary custody, such as would have been gained by seizure. *It attaches the property to make sure that it is forthcoming if finally condemned, and does no more.* (Italics ours.) (254 U. S. 554, 569.)

In the case of *Stoehr* v. *Wallace, supra,* Mr. Justice Van Devanter in discussing this same contitutional question says:

> "There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but, pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result, and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation ir pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious." (255 U. S. 239, 245-246.)

In the case of *Commercial Trust Company* v. *Miller, supra,* Mr. Justice McKenna, in summarizing the statute, says:

> "In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war, and its procedure is accommodated to and made adequate to its purpose, but securing, as well, the assertion of opposing or countervailing rights 'by a suit in equity, unembarrassed by the President's executive determination;' and, if the claimant 'prevails,' the property 'is to be forthwith returned to him.'" (262 U. S. 51, 53).

These decisions assume that the money and property sued for and every penny and parcel of it will be held until the suit is terminated, and upon no other basis can the remedy of Section 9 to be held adequate.

If, while the suit is pending, the money can be paid out or the property otherwise disposed of without notice to the claimant, and without order of Court, of what benefit is it to the claimant to obtain a full hearing upon his claim? The money and property certainly could not be forthwith returned to him, and in what way then could the Court enforce the claim?

The record in this case furnishes a concrete illustration of this. The statement submitted by the Custodian (R., pp. 74-75) shows disbursements from the Treasury in the total amount of $881,953.40, in addition to the sum of $55,909.83 withheld as "administrative expenses". Of this amount $150,000 was paid out by virtue of Court decree; but this still leaves approximately $730,000 paid out without notice to Plaintiffs and without order or decree of Court. When these payments were questioned Defendants

merely answered that the moneys had been paid out, and were no longer in their possession, and were out of their control. (Answer to Petition, paragraphs 6 and 7, R., pp. 81-82.)

We submit, therefore, that the provisions of Section 9 must prevail notwithstanding anything contained in any executive order, or in Section 24, or in any other statute that Congress did or could enact; and that the bringing of their suit in equity under Section 9 segregates the money and property which was the subject matter of that suit from the general mass of property held by the Custodian and the Treasurer of the United States, and that thereafter the sole right or power of either of these officials with respect to such money and property was that of holding and safeguarding as an attaching officer, or perhaps as a receiver in equity would do in a civil action.

The money and property which Plaintiffs sued for was their money and property and neither the Alien Property Custodian nor the United States had any right or title to it, and the Alien Property Custodian did not have and could not be given any power of disposing of the property without notice to the owners and without an order of the Court which acquired full jurisdiction over the property by the bringing of the suit. If any payments became necessary while the suit was pending the rights both of the Government and the Plaintiffs could have been protected by application to the Court on notice, which, under its general powers as well as the express authority conferred by Section 17 of the Trading with the Enemy Act, could have authorized whatever steps might be required for protection or preservation of the property which was the subject matter of the suit. The situation was substantially the same as it

would have been had the United States instituted proceedings as by a libel of information seeking condemnation of the property and confiscation as prize of war. In such proceeding custody of the property would be taken by the United States Marshal and thereafter would be held by him; but otherwise we can see no substantial difference in the situation which would result. Without an order of the Court the Marshal would have no right to sell the property nor appropriate any part of it to the expenses of his office, nor make any other disposition which would render it impossible for him to comply with the decree of the Court ordering its return to the successful claimant.

The constitutional question involved is that of "due process". Private property cannot be taken from its owner except by some procedure which guarantees to the owner his day in Court. Attachment or preliminary seizure, in the nature of attachment, can be made without notice and a hearing; but the property cannot be taken away finally from its owner without a hearing, and this means a real hearing—not a mere empty form. But of what protection to the owner is a suit when a judgment for return of his property produces not his property but merely a statement that the property has been disposed of?

That such a remedy does not satisfy the requirements of due process has been decided by this Court in several cases.

McVeigh v. *United States,* 11 Wall. 259;
Windsor v. *McVeigh,* 93 U. S. 274;
Hovey v. *Elliott,* 167 U. S. 409;
Roller v. *Holly,* 176 U. S. 398;
Ochoa v. *Hernandez, etc.,* 230 U. S. 139;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413.

The case of *Windsor* v. *McVeigh, supra,* seems to us particularly in point and the language and reasoning of the opinion of Mr. Justice Field is particularly apt to this case. That case was an action of ejectment which involved the validity of a decree of confiscation entered in a proceeding under the Confiscation Act of 1862 (12 Stat. 589). In that proceeding, the answer of the owner was stricken upon the ground that he was an enemy and judgment of condemnation was entered by default. That proceeding was held wholly void because in violation of the constitutional injunction against taking of property without due process. In discussing the essential requirements of due process, the opinion says that the requirement of notice "is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made;" and that "a denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether" (pp. 277-278). The opinion further speaks of such proceedings as "a mere arbitrary edict" and as "mere mockeries and as in no just sense judicial proceedings" (pp. 278, 281).

In the case of *Hovey* v. *Elliott, supra,* Mr. Justice White, in discussing due process and after referring to the McVeigh cases with approval, says: "If the legislative department of the government were to enact a statute conferring the right to condemn a citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution?" (p. 417). The right to be heard, however, means the right to be heard effectively. If, while the citizen is being heard, his property can be disposed of and when the Court orders its return to him the official in whose custody

it was can satisfy the judgment by merely answering that the property no longer is in his custody, the right to sue becomes, as Mr. Justice Field says, a mockery, and the sham and deceptive proceeding had better be omitted altogether. With Mr. Justice Field, we say that it is difficult to speak of such proceedings with moderation.

If we look to the law of attachment as precedent we find the rule to be that an attaching officer in case the attachment is vacated can collect neither fees nor expenses out of the property attached, and that his sole recourse is against the unsuccessful party at whose instance the attachment was issued. This has been held even in the face of statutes expressly authorizing the sheriff to collect out of the money attached or levied upon, and purporting to authorize him to refuse return to the owner until his fees and expenses have been paid.

Read v. *Williams,* 95 Ga. 103, 106-107;
Summerton Live Stock Co. v. *Cleveland Mfg. Co.,* 114 S. C. 186, 190-191;
Commonwealth Finance Corp. v. *Mo. Motor Bus Co., et al.* (Mo., 1923), 252 S. W. 372, 375 (not otherwise reported);
Bowe v. *U. S. Reflector Co.,* 36 Hun (N. Y.) 407;
Union Distilling Co. v. *Union Pharmaceutical Co.,* 56 N. Y. Superior 417;
French v. *Bankverein Suisse,* 179 App. Div. (N. Y.) 371, 372.

In the case of *Read* v. *Williams, supra,* the Court says:

"To say that a plaintiff, by simply commencing an action and putting in motion the expensive machinery of a court, can commit the estate of a

> defendant to the payment of such expenses or such costs as may be incurred, without a final judgment finding him in any sense an offender, *is a confiscation pure and simple, and abhorrent to every principle of justice and right.*" 95 Ga. 107.

In the case of *Bowe* v. *U. S. Reflector Co., supra*, the Court, after referring to the fact that the attachment was not issued at the instance or under the authority of the owner, but at the instance and upon the application of the adverse parties, and that by virtue of the attachment the owner of the attached property entered into no obligation or duty to pay costs, charges or expenses, said:

> "To permit the sheriff to hold it now, after the attachment has been set aside, until his costs, charges and expenses have been paid, and sell it for their payment, would be to allow him to hold and dispose of the property of one party to pay the debt exclusively of another." 36 Hun 409.

In the case of *Union Distilling Company* v. *Union Pharmaceutical Company, supra*, the Court discusses the provision of the New York Code that purported to give the sheriff the right to hold property until his fees were paid even when the attachment had been vacated, and said:

> "But as the counsel shows, the exaction of the section, that a person's property shall not be delivered to him until he pays fees for which he has no personal liability, is unconstitutional and therefore inoperative." 56 N. Y. Super. 422.

In another New York case (*Weston* v. *Watts*, 45 Hun 219), which, however, arose out of a receivership and not an attachment, the Court refused to tax the expenses of

the receiver against the property held by the receiver, saying:

> "It is sufficiently injurious for a person to have his property taken from him, or his person subjected to arrest, without right; and upon no legal principle can the wrong be aggravated in such a manner as to order him to pay the expenses of the proceeding.
> • • •
> The fundamental law of the State will not permit that to be done, for it has been provided by Section 6 of article 1 of the Constitution of the State, that no person shall be deprived of life, liberty or property without due process of law. And a legal proceeding by which he may be divested of his property which is unauthorized, and afterwards set aside, cannot be such due process. The law cannot sanction the taking of one man's property, in this manner and subjecting it to the expenses or obligations of another" (45 Hun 221).

This is the general rule in Equity where a receivership has been vacated.

People, etc. v. *Jones,* 33 Mich. 303;
State v. *Peoples U. S. Bank,* 197 Mo. 605, 612-615;
Ephraim v. *Pacific Bank,* 129 Cal. 589, 592-594;
Hendrie v. *Parry,* 37 Colo. 359, 365;
Moyers v. *Coiner,* 22 Fla. 422;
Link Belt v. *Hughes,* 185 Ill. 413, 417-418;
O'Mahoney v. *Belmont,* 62 N. Y. 133;
Hernandez, et al. v. *Brookdale Mills, Inc.,* 232 N. Y. 552;
Harrington v. *Union Oil Co.,* 144 Fed. 235;
Lion Bonding & Surety Co. v. *Karatz,* 262 U. S. 640;
Burnrite Coal Briquette Co. v. *Riggs,* 274 U. S. 208;

It is also the rule in bankruptcy.

In re Chas. W. Aschenbach Co., 183 Fed. 305;
Beach v. *Macon Grocery Co.*, 125 Fed. 513, 514-517;
In Re Lacov, 142 Fed. 960, 961-962;
Gillespie v. *Piles & Co.*, 178 Fed. 886, 892;
In Re Wentworth Lunch Co., 191 Fed. 821.

We do not contend here for the application of the rule of attachment in all its strictness. As stated at the outset of this brief, we concede the right of the Alien Property Custodian to charge against this property all disbursements or expenditures necessarily made for the purpose of protecting and taking care of their money and property; such in general as they themselves would have had to pay if in possession of the property. No such items are now involved in this case. This would not include any part of the rent, salaries or other fixed expenses—commonly referred to as overhead—of maintaining the Custodian's office and organization. These expenses are not attributable to the money and property involved; they are not such as the owner himself would have had to pay. They are extra expenses made necessary by and attributable to the mistake of the Alien Property Custodian in seizing property that should not have been seized.

The defendants cite the case of *Henkels* v. *Sutherland* (271 U. S. 298). This case appears to us to be beside the point. It was dealing only with earnings made by the Treasurer upon cash covered into the Treasury by the Custodian, while here we are dealing with principal; the two per cent. deducted by the Custodian having been taken entirely out of the principal. Aside from this and more

fundamentally, that case simply holds that the owners of this money paid into the Treasury while entitled to earnings upon the money, were entitled only to the net earnings, that is, to the balance after the necessary actual expenses of the Treasurer in earning these profits had been deducted. This is quite a different thing from holding that the Alien Property Custodian can deduct a part of the principal, much less an arbitrary sum which bears no relation whatever to the cost of managing or taking care of that principal.

The case of *Trustees* v. *Greenough*, 105 U. S. 527, is similar. In that case a mortgage bondholder performed services over a period of years which resulted in saving the property from waste and recovering large sums which inured not only to his benefit but to the holders of other bonds. This Court held that the fund could be charged with the costs of the litigation and with counsel fees and expenses upon the principle that the creditors of the corporation as a whole were entitled not to the gross amount recovered but only to net. In this very case, however, the Court limited the charges to actual disbursements and refused to allow anything additional to cover the private expenses of or compensation to the bondholder, but for whose active intervention the recover would not have been had.

This Court itself, in the case of *Hobbs* v. *McLean, supra,* notes the difference between a situation such as is presented in *Trustees* v. *Greenough,* and that presented here, saying:

> "But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our

> notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate". (117 U. S. 582.)

The case of *Haycraft* v. *U. S.*, 22 Wall. 81, is another cited case which is not in point. This involved so-called "Captured and Abandoned Property" seized by the army in the zone of military operations. The property when seized was converted into cash and the proceeds deposited in the Treasury of the United States. The decision in that case was simply that claimants suing under a special statute could recover only the net cash that had been covered into the Treasury. In other words, that the United States was liable only for what it actually had received. This falls far short of sustaining the right of the United States to withhold a part of the precise money and property identified as the property of Plaintiffs.

Defendants fail to cite the only case arising out of seizures under the Captured and Abandoned Property Act, which is a precedent for this case; that is the case of *Steamer Saratoga* v. *438 Bales of Cotton* (1 Woods, 75). In that case the owner was suing for his cotton before it had been sold. His claim was established but it was attempted to charge the cotton with cost of transportation and storage. The Court refused to allow such charges.

Defendants have not cited a single decision nor any rule or principle or precedent in support of the position taken for the first time in this Court, that no matter upon what basis or for what reason the $55,909.83 was withheld, plaintiffs cannot object or complain unless they can show that the amount withheld is unreasonable. The answer makes no contention or claim that the sum deducted was

reasonable, and no testimony or evidence of any kind upon any such question was taken. This Court has held that to enter judgment upon a matter not within the record and not in fact litigated, is prohibited by the Constitution because it amounts to depriving a person of property without due process.

> *Reynolds* v. *Stockton,* 140 U. S. 254, 268, 269;
> *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 426.

But, conceding that the Custodian could deduct "a reasonable charge," by what measure or yardstick is the amount of money which will constitute such a charge to be determined? In the argument for Defendants reference is made to the usual charges of trustees. For reasons already pointed out this is not a proper standard of comparison. We know of no basis other than the actual amount of necessary expenses for determining what is a reasonable charge in a situation such as this.

III.

The defendants having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of plaintiffs' money and property, the Custodian has no right to deduct and withhold any amount whatsoever on account of his so-called "administrative expenses".

This discussion brings us back to the point from which we started. The Alien Property Custodian claims the right to charge against the property of these Plaintiffs part of the general or fixed expenses, that is, overhead, of his

office. This is in addition to all of the disbursements which he can identify as being directly attributable to this money and property. The further deduction of $55,909.83 was and is contested upon the ground that it is merely an arbitrary appropriation of Plaintiffs' money to be used for the maintenance of a governmental agency—the Alien Property Custodian's office. The Custodian admits that this sum represents no disbursements or identifiable or determinable expenses incurred in respect of their money and property, but is simply an assessment of two per centum levied upon all property held, enemy and non-enemy alike. He attempts to justify such assessment against the property of these Plaintiffs upon the ground that this property should bear some part of the general expenses of his office, and because the exact amount attributable to such property has not been recorded or cannot be determined, the Custodian claims that he can charge whatever amount he may decide to take. We do not see how this can be anything but an arbitrary taking of private property prohibited by the Constitution.

We submit, therefore, that the decree of the Court of Appeals should be reversed, and that of the Supreme Court of the District of Columbia affirmed.

Respectfully submitted,

SPIER WHITAKER
LAWRENCE A. BAKER
Attorneys for Plaintiffs

Of Counsel:
LYTTLETON FOX,
HENRY ESCHER,
HENRY RAVENEL.